No. 84-6811

IN THE

Supreme Court of the United States

October Term, 1984

WARREN McCLESKEY,

Petitioner,

against

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR DR. PETER W. SPERLICH, DR. MARVIN E. WOLFGANG, PROFESSOR HANS ZEISEL & PROFESSOR FRANKLIN E. ZIMRING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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**MOTION FOR LEAVE TO
FILE BRIEF AMICI CURIAE**

Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel and Professor Franklin E. Zimring respectfully move, pursuant to Rule 36.1 of the Rules

of the Court, for leave to file the attached brief amici curiae in support of the petition for certiorari filed in this case. The consent of counsel for the petitioner has been obtained. The consent of counsel for respondent was requested but refused, necessitating this motion.

The interest of amici in this case stems from their work as social scientists whose professional contributions have significantly advanced the legal use of empirical data. Dr. Sperlich is Professor of Political Science at the University of California at Berkeley. Dr. Sperlich has taught, consulted and published widely on many criminal justice issues, including the role of juries and the use of scientific evidence in legal settings. His writings were cited prominently by the

Court of Appeals in McCleskey v. Kemp. Dr. Wolfgang is Professor of Criminology and Criminal Law and Director of theCenter for Studies in Criminology and Criminal Law at the University of Pennsylvania. During his distinguished career, Dr. Wolfgang has made numerous contributions to the development of empirical research on legal issues. His pioneering study on the influence of racial factors in the imposition of death sentences for rape was the object of intensive legal examination during the Maxwell v. Bishop litigation of the 1960s. Professor Hans Zeisel is Emeritus Professor of Law and Sociology and Associate of the Center for Criminal Justice Studies at the University of Chicago. Professor Zeisel is co-author of The American Jury, widely recognized as one of the most influential empirical

studies of the legal system ever published. Professor Zeisel's empirical research on the functioning of juries was relied upon by this Court in Ballew v. Georgia, 435 U.S. 233 (1978). Professor Zimring is Professor of Law and Director of the Earl Warren Institute at Boalt Hall, University of California at Berkeley. Professor Zimring has written extensively on criminal justice issues, including juvenile crime and sentencing, the deterent value of punishment, and the control of firearms. Professor Zimring served as Director of Research for the Task Force on Firearms of the National Commission on the Causes and Prevention of Violence, and has also served as consultant to many private and public organiza-

tions concerned with the application of social scientific perspectives to legal issues.

The present case focuses on two unusually sophisticated and comprehensive social scientific studies that address on an important public issue: racial disparities in a State's capital sentencing system. In amici's judgment, the courts below have not appreciated either the remarkable soundness of that research or the significance of its findings. Amici's professional interest is not in the ultimate resolution of the legal issues presented, which involve constitutional considerations upon which amici would not presume to advise the Court. However, amici do wish to provide the Court with an informed appraisal of (i) the record facts, specifically, the two

empirical studies that comprise the basis for petitioner McCleskey's constitutional claims of arbitrariness and racial discrimination; and (ii) the lower courts' evaluation of those studies. Amici hope that their views might assist the Court's resolution of this important matter.

Amici's special interest is prompted by the skepticism and implicit hostility toward statistical evidence that animate the opinions of the lower courts. Ironically, both the strengths and the limits of social scientific research have been misunderstood by the Court of Appeals.

The broad sweep of the court's language, moreover, threatens not only to end further legal use of empirical evidence in determining whether our nation's capital punishment statutes are being applied in a racially discriminatory

manner, but to discourage, as a practical matter, the use of statistical evidence in other areas of the law -- an outcome that would constitute a regrettable development in the relationship between the disciplines of law and social science.

Dated: New York, New York
June 27, 1985

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Baldus studies presented by the petitioner in McCleskey v. Kemp are the most sophisticated and comprehensive

empirical studies on criminal sentencing ever submitted to any court. They have been meticulously conducted and are distinguished by state-of-the-art procedures. The analytical methods employed are appropriate, and the results -- demonstrating racial disparities in capital sentencing at a highly statistically significant level -- are sound and valid.

The District Court and the Court of Appeals display profound misunderstanding of the statistical evidence itself and of the significance of that evidence. Many of their technical criticisms are misinformed or erroneous, and their reservations about the reliability of the research are inappropriate. Most importantly, the Court of Appeals has failed to recognize the significance of the racial disparities reported by Professor Baldus; his findings

demonstrate in fact that race continues to have an important impact in death-sentencing decisions in the State of Georgia.

The opinion of the Court of Appeals also expresses a general skepticism toward social scientific methods and results that is unwarranted and possibly injurious to the continued ability of courts to make use of statistically reliable evidence -- in many contexts other than capital sentencing -- within the Eleventh Circuit.

ARGUMENT

I.

THE LOWER COURTS HAVE SERIOUSLY UNDERVALUED BOTH THE VALIDITY OF THE BALDUS STUDIES AND THE SIGNIFICANCE OF THEIR FINDINGS

To be of significant value to the courts, social scientific research, like any other evidence, plainly must be reliable. If research lacks "internal

validity" -- if its methods are inappropriate, or if its execution is careless and slipshod -- it does not deserve the serious attention of the courts.

On the other hand, when research has been meticulously conducted, when analyses are searching and exhaustive, social scientific studies, as the Court has often acknowledged, can be of great value in resolving legal disputes. See, e.g., Ballew v. Georgia, 435 U.S. 233 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

Some of the most valuable contributions by social science to the resolution of legal issues have been made in the area of racial discrimination. Through the use of statistical techniques such as multiple regression analysis, social scientists and statisticians have regularly assisted courts in discerning the influence of race

on complex decisionmaking processes that may involve dozens of independent considerations. See generally Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L. Rev. 737 (1980); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980).

A. The Baldus Studies

In our judgment as social scientists, the two studies of Georgia's capital punishment system conducted by Professor Baldus and his colleagues are examples of excellent professional empirical studies. The researchers had full access to official State files on each homicide case, permitting them to assemble data distinguished by its unusual richness and high quality. The design of the studies is sophisticated, and the number of relevant

sentencing factors considered exceeds that of any major study ever conducted in this field. The researchers have followed elaborate, state-of-the-art procedures in data collection and entry.

Professor Baldus' analytical methods, moreover, illustrate the unique contribution social science can make to legal problems. The unadjusted racial disparity in capital sentencing in the State of Georgia are striking: one whose victim is white is eleven times more likely to receive a death sentence than one whose victim is black. Professor Baldus, however, did not rest his conclusions on these unadjusted racial disparities. Instead, he used an array of increasingly more complex statistical methods to test dozens of alternative hypotheses that might have disproven or eliminated the effects of race. He turned social science methods, in other words, against his own

unadjusted findings, subjecting his data to rigorous scientific scrutiny designed to determine whether the apparent racial effects would persist when other factors were taken into account.

Although Baldus has been conservative in his findings, the adjusted influence of racial factors on Georgia's capital sentencing system remains clear and significant. Race, especially the race of the homicide victim, plays a large and recognizable part in determining who among convicted Georgia defendants will be sentenced to life and who will be sentenced to death. Baldus reports, for example, that the odds of receiving a death sentence are increased by 4.3 times if the victim is white, even when he controls for dozens of other legitimate variables.

Why, in view of the soundness and importance of these findings, have the Baldus studies been rejected by the lower courts? If the answer to this important question were solely a matter of constitutional law, we of course would have no role as amici before this Court. The opinions of the lower courts, however, reflect a profound misunderstanding of Baldus' research or, at best, an unwarranted mistrust of the significance of his results.

B. The Opinion of the District Court

The District Court's opinion, in particular, recites a Luddite's list of grievances against empirical methods and procedures, almost none of which are well-founded. It asserts that Baldus' data base was "substantially flawed" because it "could not capture every nuance of every case," McCleskey v. Zant, 580 F.

Supp. 338, 356 (N.D. Ga. 1984). None of Baldus' many models, even those with over 230 variables, are deemed sufficient in the District Court's eyes, since they "have [not] accounted for ... unaccounted-for factors." Id. at 362.

These objections are fundamentally misplaced. One essential quality of statistical analysis is its power to tell us many things about a phenomenon with great reliability, without the necessity of knowing everything about that phenomenon. As a scientific matter, the likelihood that any omitted variable could significantly affect Baldus' robust racial findings -- especially when so many legitimate variables have been taken into account -- is truly negligible. By insisting on a standard of "absolute knowledge" about every case, however, the District Court implicitly rejects the value of all applied statistical analysis,

which has brought us much of what we know in medicine, genetics, agronomy and other areas of science.

The District Court also expresses general skepticism toward a range of well-established social scientific methods employed by Baldus, including multiple regression analysis, which it finds "ill suited to provide the Court with circumstantial evidence of the presence of discrimination." Id. at 372 (emphasis omitted). Indeed the only statistical method the District Court does seem to approve is the simple cross-tabular approach, id. at 354, even though the Court acknowledges that the inherent nature of the problem under study here makes it "impossible to get any statistically significant results in comparing exact cases using a cross tabulation method." Id. at 354. This preference for

cross-tabular methods lacks any scientific foundation. Baldus' methods are clearly valid and appropriate to his data.

Finally, in evaluating Baldus' results, the District Court seizes upon a somewhat confused welter of statistical issues, including Baldus' conventions for coding "unknown" data, id. at 357-59, the possible multicollinearity of Baldus' variables, id. at 363-64, and the reported R^2 of his model, id. at 351, 361, as reasons for its ultimate conclusion that Baldus' results cannot be relied upon. However, Baldus and his colleagues satisfactorily addressed each of these issues and demonstrated that the racial results were not adversely affected by such concerns. Baldus not only employed the correct method of treating "unknowns"; he conducted alternative analysis to demonstrate that racial influences persisted irrespective of the method of

treatment adopted. Multicollinearity undoubtedly affected some of the larger models employed by Baldus; however, the District Court failed to realize that the presence of of multicollinearity would not affect the estimate of the racial results reported. It would only affect the standard error of that estimate. Finally, the Court's concern with the reported R^2 of Baldus' models is unfounded. Apart from the questionable relevance of the R^2 measure for logistic models of the type used by Baldus, an R^2 of .40 or higher is quite acceptable.

In sum, the District Court opinions is a compendium of basic statistical errors and misunderstandings. Its evaluation of the validity of the Baldus studies is off-target.

C. The Opinion of the Court of Appeals

The Court of Appeals purports to take a different approach to Baldus' research: it announces that it will "assum[e] [the study's] validity and that it proves what it claims to prove," McCleskey v. Kemp, 753 F.2d 877, 886 (11th Cir. 1985) (en banc), and will base its judgment solely on the legal consequences which flow from that research. Yet even a quick reading of the Court's opinion persuades us that the skepticism which pervaded the District Court's analysis continues to dominate the treatment of Baldus' research by the Court of Appeals. After first knitting together citations from several scholarly articles that caution courts against an unreflective use of social scientific evidence, id. at 887-90, the Court announces "that generalized statistical studies are of little use in deciding whether a particu-

lar defendant has been unconstitutionally sentenced to death ... [and] are at most probative of how much disparity is present." Id. at 894. That observation misses the point: although statistics cannot determine with absolute certainty whether any one defendant may have been sentenced to death because of race, statistical evidence can determine with great reliability whether racial factors are playing a role in the sentencing system as a whole. Baldus' studies provide just such evidence.

When the Court turns to Baldus' studies, it relies almost entirely upon one summary figure drawn from the entire body of Baldus' results -- a reported .06 disparity by race of victim in overall death-sentencing rates. As we view Baldus' research, this is but one of a number of important, meaningful results indicating a consistent racial presence in Georgia

sentence patterns. Seen as such, this figure is important, though obviously by no means the sole basis for Baldus's conclusions.

The Court of Appeals, however, misunderstands even the significance of this one figure, repeatedly describing it as a six percent disparity, see, e.g., McCleskey v. Kemp, supra, 753 F.2d at 896, 899, rather than a six percentage point disparity. The distinction is by no means technical. The overall death-sentencing rate in the State of Georgia is quite small, only .05, or 5-in-100. Thus a six pecentage point increase, for example, raises the death-sentencing rate from .05 to .11, a percentage increase of 120%. Baldus in fact reports a death-odds multipler effect of 4.3: that is, the odds of receiving a death sentence are 4.3 times greater if one's victim is white.

Such an impact, larger than that of a number of Georgia's statutory aggravation circumstances, scarcely seems "marginal."

Moreover, when the Court of Appeals examines Baldus' well-documented finding of a 20-point racial disparity in the "midrange" of cases, it indulges a quick succession of disparaging observations --none of which is defensible. The expert testimony at trial strongly substantiates the existence of a meaningful, statistically significant "midrange" of Georgia cases. Warren McCleskey, in fact, falls squarely within that midrange.

In sum, the Court of Appeals, like the District Court, fundamentally mistrusts Baldus' findings and undervalues their significance as proof of racial disparities in Georgia's capital sentencing system. From our perspective as social scientists, that mistrust is unwarranted. The Baldus studies are

sound; they are consistent with prior research; and their basic conclusions are entitled to the confidence of the scientific and the legal communities.

II.

THE COURT OF APPEALS' RELUCTANCE TO ACCEPT RELIABLE SOCIAL SCIENTIFIC METHODS AND FINDINGS WARRANTS REVIEW BY THIS COURT

It is possible that the extraodinary reluctance of the Court of Appeals to place reliance upon Baldus' research reflects no more than an unwillingness, despite the evidence, to invalidate post-Furman capital statutes. The opinion, however, does not expressly limit its holding to death penalty cases. Instead, it articulates a standard of proof that seems applicable to other Equal

Protection Clause challenges, see, e.g., id. at 887-90, and perhaps to Title VII disparate treatment cases as well.

If so, the opinion raises important issues about the usefulness of social scientific evidence that transcend the McCleskey case itself. The contributions of social scientific evidence to the resolution of legal issues has increased significantly in recent decades, as statistical methods have improved and the confidence of the courts has grown. This Court has led the lower federal courts toward an appreciation of the nature of such evidence, and has developed legal principles, including standards of proof for parties presenting statistical evidence, that reflect a clear understanding of the powerful utility of reliable social scientific evidence. See, e.g., Hazelwood School District v. United States, 433 U.S. 299 (1977); Teamsters v.

United States, 431 U.S. 324 (1977); see also Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 244 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).

The Court of Appeals has disregarded these basic standards of proof that have been fashioned by the Court. Its opinion in McClesky insists upon a level of methodological purity in data quality, model design, and analysis that can be achieved only in theory. If left unreviewed, the opinion of the Court of Appeals will erect formidable barriers against the use of reliable statistical evidence that can, and amici believe, properly should be used by the courts to resolve complex legal issues that regularly come before them for decision.

CONCLUSION

For the reasons set forth above, amici curiae respectfully urge the Court to grant certiorari in the McCleskey v. Kemp case and engage in a full consideration of the important questions it presents for review.

Dated: New York, New York
June 27, 1985

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* on the parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this 27th day of June, 1985.

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